Supreme Court, U. S.
FILED
DEC 8 1977
MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

October Term, 1977

No. 77-668

ALABAMA ASSOCIATION OF INSURANCE AGENTS, INC., ET AL.,

Petitioners,

versus

BOARD OF GOVERNORS OF THE FEDERAL RESERVE SYSTEM,

Respondent.

BRIEF FOR INTERVENOR, FIRST NATIONAL HOLDING CORP., IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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OPINIONS BELOW

The pertinent opinions rendered below have been duly set out in the Appendices to Petitioners' Petition for Certiorari.

JURISDICTION

No consideration under Rule 19 of this Court governing review on certiorari exists in this case which would give this Court jurisdiction under its own rules.

QUESTIONS PRESENTED

Whether a writ of certiorari should be granted where the petitioners allege (presumably) that review should be had under the rules of this Court because the decision below was in conflict with decisions of other Courts of Appeals, or that the Court below has decided a federal question in conflict with applicable decisions of this Court, or in conflict with applicable State law but where the petition for certiorari, when pierced, fails to show any grounds for such allegations?

STATUTES INVOLVED

The pertinent statutes involved are properly set forth in the Appendices of the petition for certiorari.

STATEMENT OF THE CASE

Intervenor accepts the general statement (but not the conclusions and shadings drawn by petitioners therefrom) put forth by petitioners.

ARGUMENT

I.

The Petition for Certiorari Fails to Set Forth Any Grounds for Certiorari Under Rule 19 Of This Court and, In Particular, Fails to Show Any Conflict in the Decision of the Court Below Regarding the "Closely Related" Test As Applied by Courts of Appeals of Any Circuit.

Petitioners strive mightily to bring their case within the "conflict of circuits" portion of Rule 19, asserting boldly that this is a case of "first impression". Except to

the extent any new set of facts presented by a given case would be a "first impression" as to those facts, there are no issues of law presented by this case that have not been well settled by prior decisions, either of this Court or of competent inferior courts, including, among others, the very decision relied on by petitioners in their petition. Petitioners assert that the decision of the lower court in the case involved, with respect to the "closely related" test of the 1970 Amendments to the Bank Holding Company Act[1] (the "Act"), is directly in conflict with the decision of the United States Court of Appeals for the District of Columbia Circuit in the *National Courier* case cited in petitioners' brief (516 F.2d 1229). As a matter of fact, the two cases are almost 'mirror image" consistent; indeed, the lower court in the case at bar cited with approval and applied the *National Courier* decision in its own decision.

National Courier involved a portion of Regulation Y of the Federal Reserve Board (the "Board") issued pursuant to §4(c)(8) of the Act, which regulation approved as "closely related to banking," activities of a holding company relating to certain courier and transportation services for (i) the internal operation of the holding company, (ii) checks and instruments exchanged among banks and banking instrumentalities, (iii) audit and accounting media of a banking and financial nature and related business records and (iv) courier services for nonfinancially related material upon the unsolicitated request of third parties where other courier services were not available.

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[1] Appendix I of Petitioners' brief

By comparison, in the case involved, the Board in its Regulation Y sought to authorize as "closely related to banking" bank holding company activities as insurance agents or brokers for (i) insurance for the holding company and its subsidiaries, (ii) insurance directly related to an extension of credit by a bank or bank-related firm or that was directly related to the provision of other financial services by such, (iii) insurance sold as a matter of convenience to the purchaser under certain limitations, and (iv) insurance sold in a community which has a population not exceeding 5,000 or where insurance agency facilities were inadequate.

In *National Courier*, the Court of Appeals asserted (as did our Court below) that the Board must "articulate the ways in which banking activities and opposing activities are assertedly connected" and must find that the connections are close. The Court said at page 1237:

> "... at *least*, the following seem to us within the statutory intent:
>
> "1. Banks generally have in fact provided the proposed services.
>
> "2. Banks generally provide services that are operationally or functionally so similar to the proposed services as to equip them particularly well to provide the proposed service.
>
> "3. Banks generally provide services that are so integrally related to the proposed services as to require their provision in a specialized form." (Emphasis added.)

The Court in *National Courier* found all but the last of the above-stated courier activities passed the "closely related" test. However, it felt that the provision of non-financially related incidental courier services was justified by the Board only because it would serve someone's convenience and not because they were "closely related to banking" and held that the services authorized in this last category were, therefore, not validly permissible under the Act.

Likewise, in our case, the lower Court found that most of the insurance activities authorized by the Board in its Regulation Y were indeed "closely related to banking," but struck down not one (as in *National Courier*) but three of the insurance activities originally permitted by the Board in its regulation. Thus, the Court found (i) that that portion of §(a)(9)(i)[2] of the Regulation which authorized the sale of insurance for a bank holding company and its nonbank subsidiaries must be invalidated since they were not "closely related to banking," (ii) that §(9)(ii)(c) of the same Regulation, which purported to authorize "convenience insurance sales", was too broad for the same reason, and (iii) insurance sales by bank holding companies in communities under 5,000 were merely for the "convenience" of the public and not in any way related to banking.

In arriving at its decision, the Court below relied upon, and frequently quoted, *National Courier*. Both Courts came to almost identical conclusions for approximately the same reason. Both Courts emphasized the Board's broad powers and the discretion of the Board under applicable principles of administrative law[3]. Both Courts recognized the limited role of a court in reviewing the Board's regulation[4].

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[2] Appendix I of Petitioners' brief, p. 143a

[3] 516 F.2d at 1237; Appendix A, pp. 19a, 21a and 31a of Petitioners' Brief.

[4] 516 F.2d at 1235; Appendix A, p. 21a of Petitioners' Brief.

Possibly, petitioner's contention rests on its perceived conclusion that the Court below in this case, after recognizing the three "closely related" tests set forth in *National Courier*, applied them to bar insurance for the holding company and its *nonbanking* subsidiaries but refused to apply the tests to bar insurance sold to *bank* subsidiaries. Petitioner has misread the *National Courier* tests, which were not, and were not intended to be, exclusive. To quote the *National Courier* court, "at least" these three elements should be in the test. The Court in our case, while recognizing and citing the three tests, was "willing . . . to consider broader types of relationships". There is nothing inconsistent in *National Courier* and *Alabama Association* on the question of "closely related to banking".

Incidentally, Petitioner's statement on page 13 of its brief that the *National Courier* test was applied and rejected by the Court below with respect to the "sale of property and casualty insurance", in general, is ambiguous. The Court was ruling there only on the sale of such insurance *to* banking subsidiaries, and was not discussing the proposition of sales of property and casualty insurance such as might be related to credit *by* the holding company or its subsidiaries, which authorization rests on entirely different grounds.

II.

The Petition Likewise Fails to Show Any Conflict in the Decision of the Court Below Regarding the "Public Benefits" Test As Applied by Courts of Appeals of Any Circuit.[5]

Petitioners cite *American Bancorporation*[6] decided in the Eighth Circuit and *Independent Bankers*[7] de-

[5] Appendix I, Petitioners' Brief, p. 141a.
[6] 509 F.2d 29.
[7] 516 F.2d 1206.

cided by the United States Court of Appeals for the District of Columbia Circuit as being in conflict with the decision of the Court below as to the application of the "public benefits" test of §4(c)(8). Both the *American Bancorporation* and the *Independent Bankers* cases merely held that the protestants were entitled to a full hearing on the specific aspects of their respective applications which would bear on the "public benefits" required by the statute. Of course, in our case, extensive hearings were, in fact, held at which petitioners appeared, presented numerous witnesses and conducted extensive cross examination. Even so, the deficiencies in this area asserted by the petitioners relate solely to the case of the other Intervenor (Southern Bancorporation) and not to First National's case. We assert, however, the soundness of the Court's deference to the judgment of the Board in weighing the various competing interests involved, in light of the Board's long expertise. Nevertheless, Petitioner's brief fails to show any conflict whatsoever in the circuits on this issue.

III.

The Court Was Correct in Not Remanding the Case to the Board, Since the Decision of the Board was Supported by Substantial Evidence Even After the Decision of the Court of Appeals.

The petitioners insist that the court below should have remanded the matter to the Board for a rebalancing of public benefits against adverse effects on the public interest, since the Court has ruled that two of the three "benefits" were not supported by sufficient evidence. Intervenor would point out, first, that the three "benefits" mentioned in the statute were not exclusive or mandatory, but were suggested,

by use of the words "such as", as typical of what the Board should look for. Nevertheless, even considering these three factors alone, the Court found one favorable factor remaining, and no adverse effects on the public interest. It held:

> "In summary, we find that the Board's conclusions with respect to efficiency gains and greater convenience are not supported by substantial evidence, but that its other findings are. Accordingly, the Board properly found one type of public benefit, in the form of increased competition, and no adverse effects on the public interest. The Board's overall finding, that public benefits outweigh adverse effects of granting the applications, can therefore be upheld."

This is, of course, the "substantial evidence" rule of administrative law as set forth in the leading case of *Universal Camera Corp. v. National Labor Relations Board,* 340 U.S. 474, 71 S.Ct. 456 (1951). In that case, Mr. Justice Frankfurter held that a reviewing court should not disturb an agency decision if there is substantial support for the decision in the record, and he made it clear that a reviewing court should consider the record as a whole in determining whether there was substantial support and should not focus on isolated portions of the record. This general rule has remained essentially unchanged to this date and it is entirely applicable here.

The *Chenery* case and the *Third National Bank* case cited by the petitioners (page 16, petitioners' Brief) are not in point. *Chenery,* of course, is a landmark case in the administrative law field but does not deal with the point at issue here. In fact this Court there held that if the SEC had promulgated a general rule (as the

Board has here) and adopted an order of which the matter at issue was a particular application, the situation would be different. In *Third National,* the remand was to a court, not an agency, and even then, because the court had applied the wrong rule and not because of insufficient evidence.

Intervenor submits that the correct rule here is that of *Universal Camera* to the effect that the entire record as a whole must be considered in a search for substantial support and that the Court below, having done so, quite properly let stand the Board's decision. *See also, Bowman Transportation, Inc. v. Arkansas-Best Freight System, Inc.,* 419 U.S. 281, 95 S.Ct. 438 (1974).

Furthermore, the courts have held not only that the ruling of an agency in its field of expertise must be upheld if supported by substantial evidence (*see, Northwest Bancorporation v. Board of Governors of the Federal Reserve System,* 303 F.2d 832 (8th Cir. 1962) but also, that the responsibility to assess the record to determine whether agency findings are supported by substantial evidence is not that of this Court but of the Court of Appeals. *Mobil Oil Corp. v. FPC,* 417 U.S. 283, 94 S.Ct. 2328 (1974).

IV.

The Other Assertions of the Petitioners Supporting Their Claim of a Right to Certiorari Are Either Not Applicable to Intervenor or Are Without Merit.

The claim of the petitioners that approval of the instant application would transgress state law, even if valid, would affect only the Intervenor, Southern

Bancorporation. The other points are simply without merit. There is nothing in the record to indicate that the applicants will not make every effort to obtain insurance for the customers at the lowest practical cost. Any other policy would not make good competitive sense, nor is there any merit in the claim that the court ignored the record. The Board, and not its Administrative Law Judge, has the ultimate responsibility to exercise its expertise in coming to appropriate conclusions on the basis of the record. Intervenor has already discussed the "substantial evidence" rule in an earlier section and will not repeat it here.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for writ of certiorari should be denied.

Respectfully submitted,

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December 7, 1977

CERTIFICATE OF SERVICE

The undersigned attorney for the Intervenor, First National Holding Corp., hereby certifies that copies of the foregoing Brief for Intervenor, First National Holding Corp., in Opposition to Petition for Writ of Certiorari have been served upon counsel for the other parties by mailing three (3) copies, postage prepaid, to the following:

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